

APPEAL NO. 040644  
FILED APRIL 26, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 4, 2004. The hearing officer determined that the appellant (claimant) sustained a compensable injury on \_\_\_\_\_; that the compensable injury of \_\_\_\_\_, extends to and includes a torn left rotator cuff, bilateral foraminal stenosis at the C2-3, C3-4, C4-5, C5-6 spinal levels, central spinal stenosis at the C4-5 and C5-6 spinal levels, and herniated nucleus pulposes at the C4-5 and C5-6 spinal levels; that the compensable injury of \_\_\_\_\_, does not extend to or include a disc bulge at the L4-5 spinal level, spondylolisthesis and/or spondylolysis of L5-S1, or a head injury; and that the respondent (carrier) did not waive its right to dispute the extent of injury presented for resolution in this decision. The claimant appeals the determinations pertaining to the lumbar spine, the head, and carrier waiver, asserting that the hearing officer incorrectly framed the issues, that she incorrectly applied the law, and that her factual determinations are against the great weight and preponderance of the evidence. The carrier responds, urging affirmance. The determinations that the claimant sustained a compensable injury, and that the injury extended to the cervical conditions named above have not been appealed and have become final. Section 410.169.

DECISION

Reversed and rendered in part; affirmed in part.

The claimant first asserts that the hearing officer incorrectly framed the issues. We note that the benefit review conference report lists the carrier waiver issue as follows:

Has the Carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Texas Labor Code 409.021 and 409.022?

At the CCH, the hearing officer listed the issues exactly as she has set them forth in the Decision and Order. She read the third issue as: "Whether Carrier has waived its right to dispute the compensability and/or the extent of the alleged injury." Both counsel indicated agreement with the issue as stated. There was no discussion on the record that explained the change in the wording of the issue. That the claimant now complains about the change in wording is an indication that this was not discussed and agreed upon by all parties, but that need not concern us further at this point, except to note that hearing officers should clearly explain changes in the wording of the issues and, at a minimum, allow the parties to comment on the record concerning the changes. In this case, we are able to complete our review, notwithstanding the apparent unilateral rewording of the issue by the hearing officer.

It is undisputed that the carrier received its first written notice of the claimant's \_\_\_\_\_, injury on August 23, 2002, and that it did not accept or dispute the compensability of the injury on or before August 30, 2002. The claimant's undated report of injury contains a block labeled: "List all parts of the body affected by injury (be specific):" and the entry: "left side – butt to l. shoulder, neck, back" with an additional notation at the bottom of the form: "Headaches, dizzy Pain lower back." The carrier argued at the CCH that it has never disputed that the claimant was injured, that it paid income benefits and provided medical care, and that this is an extent of injury case, not a carrier waiver case. We disagree.

In accordance with the decision of the Supreme Court in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), and our decision in Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the carrier was required to comply with the seven day "pay or dispute" provision of Section 409.021 by taking some action within seven days of receiving written notice of the injury. It did not do so and has waived the right to contest the compensability of the claim. The next question to answer is what injury has the carrier waived into? The hearing officer erred to the extent that she did not really answer this issue directly, making a finding instead that: "The case at bar presents an issue of extent of injury with respect to Claimant's head and cervical and lumbar spine." For the reasons stated below, we reverse Finding of Fact No. 17 (in part) and change it to read: The case at bar presents an issue of extent of injury with respect to Claimant's head, but not as to Claimant's cervical and lumbar spine, as Carrier waived the right to dispute the compensability of the cervical and lumbar spine. Clearly, the carrier was provided with notice that the primary claimed injury included the left shoulder, the neck, and the back. The carrier contended that it did not waive its right to dispute the claimant's injuries to the cervical and lumbar regions, to the extent that such injuries extended beyond sprain/strain injuries, asserting that this presented an extent-of-injury issue, not a waiver issue. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to "extent of injury" disputes. Notwithstanding, we have said that that rule cannot be interpreted in a way that would allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby avoid the mandates of Section 409.021. See Texas Workers' Compensation Commission Appeal No. 022454, decided November 18, 2002; Texas Workers' Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers' Compensation Commission Appeal No. 022183, decided October 9, 2002. It is clear from this case that the primary claimed injury included both the neck and the low back. As such, the carrier was obligated to dispute the compensability of the claimed neck and low back injuries in accordance with Section 409.021. The carrier failed to do this. Since the carrier waived the right to contest compensability of the injury, the claimant's primary claimed injury to his left shoulder, neck, and low back became compensable as a matter of law, and it was error for the hearing officer to limit the claimant's compensable injury as she did. Texas Workers' Compensation Commission Appeal No. 030831, decided May 22, 2003; Texas Workers' Compensation Commission Appeal No. 023101, decided January 30, 2003; and Appeal

No. 022183, *supra*. We reverse Conclusion of Law No. 6 (in part) and change it to read: Carrier did not waive its right to dispute the extent-of-injury with respect to the Claimant's head, but may not dispute the compensability of the conditions of the Claimant's cervical and lumbar spine, as Carrier waived the right to dispute the compensability of the cervical and lumbar spine.

Since the claimant's original report of injury did not include a report of an injury to the head (without more, we do not equate a report of symptoms of "headaches" and "dizzy" with a claimed injury to the head), the hearing officer was free to decide the question about the head injury as an extent-of-injury issue. Whether or not the claimant's \_\_\_\_\_, compensable injury extends to and includes a head injury presented a question of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence, including the medical evidence. Section 410.165(a); Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Nothing in our review of the record reveals that the hearing officer's determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We reverse that portion of the decision of the hearing officer that states that the claimant's lumbar injury other than a lumbar sprain/strain is not compensable, and render a new decision that the claimant's L4-5 disc bulge and L5-S1 spondylolisthesis and/or spondylosis are compensable as a matter of law, due to the carrier's waiver. We affirm the decision of the hearing officer that the cervical injury is compensable, but do so on the rationale that the injury is compensable as a matter of law, due to the carrier's waiver. We affirm the decision and order of the hearing officer as to the claimed head injury.

The true corporate name of the insurance carrier is **BITUMINOUS CASUALTY CORPORATION** and the name and address of its registered agent for service of process is

**GLENN CAMERON  
222 WEST LAS COLINAS BOULEVARD, SUITE 1720  
IRVING, TEXAS 75016-7968.**

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Michael B. McShane  
Appeals Panel  
Manager/Judge

CONCUR:

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Daniel R. Barry  
Appeals Judge

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Chris Cowan  
Appeals Judge